United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-2093

To be argued by
DAVID L. BIRCH

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ALFRED LEWIS,

Petitioner-Appellee,

-against-

ROBERT J. HENDERSON,

Respondent-Appellant.

B
P/s

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLANT

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ALFRED LEWIS, :

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BRIEF FOR RESPONDENT-APPELLANT

Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Frankel, J.) dated July 16, 1976 ordering that petitioner be released from custody unless he was retried within sixty days.

The evidentiary hearing before the District Court was held pursuant to order of this Court, reported at 520 F. 2d 896 (2d Cir) cert. den. 96 S. Ct. 429 (1975).

The District Court, in a memorandum dated September 1, 1976, stayed its order pending appeal on the condition that respondent move for an expedited appeal. An expedited appeal was granted by this Court in a revised scheduling order dated September 13, 1976.

Statement of Facts & Prior Proceedings

Petitioner-appellee ("petitioner") is incarcerated at the Clinton Correctional Facility, Dannemora, New York pursuant to a conviction of the Bronx County Court, after a trial by jury, on November 25, 1958, of robbery in the first degree, grand larceny in the first degree, and assault in the second degree. He was sentenced by the Court (McCaffrey, J.) to a term of from 30 to 60 years.* The conviction was affirmed by the Appellate Division, 10 A D 2d 924, 202 N.Y.S. 2d 1001 (1st Dept. 1960) and leave to appeal to the Court of Appeals was denied on July 15, 1960.

After several applications for post-conviction relief which were denied by both the State and Federal Courts,**

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* Pursuant to a 1972 amendment to the Correction Law, § 212-a, petitioner became elegible for parole after serving 8 years and 4 months

** The history of these proceedings is set forth in the opinion of this Court reported at 520 F. 2d 896 (2d Cir.) cert. den. 96 S. Ct. 429 (1975) reproduced in appellant's appendix at pp. 37-45.

this Court, in an opinion reported at 520 F. 2d 896 (2d Cir.) cert. den. 96 S. Ct. 429 (1975), ordered an evidentiary hearing to determine if petitioner's confessions were the product of mental coercion.

That hearing was held before the District Court (Frankel, J.) on April 6, 1976. In an opinion dated July 16, 1976, the Court found that petitioner's confession was the result of mental coercion.

Questions Presented

1. Did the District Court misinterpret this Court's mandate? Did the "totality of circumstances" in this pre-Miranda case fail to demonstrate that petitioner's confession was involuntary by reason of mental coercion?

2. Was petitioner's confession the result of mental coercion?

3. Was the introduction of petitioner's confession at trial harmless error even if it were the product of mental coercion?

POINT I

THE DISTRICT COURT MISINTERPRETED THIS COURT'S MANDATE. THE "TOTALITY OF CIRCUMSTANCES" IN THIS PRE-MIRANDA CASE* DO NOT DEMONSTRATE THAT PETITIONER'S CONFESSION WAS INVOLUNTARY BY REASON OF MENTAL COERCION.

This Court, in its decision remanding the case at bar for an evidentiary hearing, observed that beyond the earlier broad generalizations by the Supreme Court governing the admissibility of confessions

> "...there are now a significant number of Supreme Court decisions which go beyond general expressions of standard and explicate particular factors or groups of factors which, when included in the totality of circumstances be invalidated on grounds of coercion." United States ex rel. Lewis v. Henderson, 520 F. 2d 896, 900-901 (2d Cir. 1975).

Two significant inferences flow from the remand decision (1) in order for the petitioner to have prevailed it was incumbent upon him to demonstrate that the enumerated

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* Respondent concedes that petitioner, in this pre-Miranda case was not advised of his right to counsel or his right to remain silent.

circumstances or "particular factors" in combination or tandem were present at the time he confessed and (2) the District Court had to refer to the particular factors set forth in the cited Supreme Court decisions in the remand order to determine whether petitioner's factual presentation falls within their intended purview.*

On the basis of the evidence adduced at the mandated hearing before the District Court, this burden clearly was not met, let alone approached by petitioner. To be sure, petitioner's account of the relevant circumstances surrounding the making and signing of the confession was at once effectively

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* Insofar as the District Court's order is based on findings of fact, those findings are clearly erroneous. Fed. Rules Civ. Proc., Rule 52(a). See 5A Moore Federal Practice (2d Ed. 1975) ¶52.03[1]. Insofar as the District Court misinterpreted this Court's mandate, its findings are findings of law which are not binding on this Court.

This brief is of course written in light of this Court's prior opinion in this case reported at 520 F.2d 896. Respondent does not concede that petitioner was entitled to an evidentiary hearing, but maintains that petitioner has never made out a prima facie case sufficient to warrant an evidentiary hearing.

barred by this Court's prior determination adopting the State Court's finding of no physical coercion and contradicted in its "essential elements" (Cf. Haymes v. Wsshington, 373 U.S. 503, 507 ([1963]) by respondent's adduced testimony.

The relevant "techniques" and circumstances described by this Court which, if proven, would result in a determination that petitioner's will was unconstitutionally overborne are (a) youth and limited education; (b) an arrest in questionable circumstances; (c) all night questioning; (d) denial of sleep and food; (e) deception by false promises of help and (f) deprivation of the support of counsel and friends until petitioner confessed. United States ex rel. Lewis v. Henderson, supra at 902.

We now turn to petitioner's specific allegations and respondent's responses thereto as called from his testimony at the hearing and prior proceedings on this habeas corpus application.

(a) Petitioner's Age and Education

Petitioner at the time of his arrest was twenty-two years old (H 38)* with a 9th grade education (H 44). Patently, without more, Haley v. Ohio, 332 U.S. 596 (1948) as a factor in the "totality of circumstances" equation is cancelled since Haley was a fifteen year old boy and the Supreme Court pointedly stated that the "tender age" of Haley was the significant factor in that case for as the Court noted there "[Haley] ... cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." Id at 599. It necessarily must follow therefore, at least as to chronological age, the petitioner here can be judged "by the more exacting standards of maturity."

* Arabic numerals in parenthesis preceded by "H" refer to pages of the mandated hearing before the District Court on April 5, 1976 and part of the record.

Neither is there any indication here of a person of immature mental age. Unlike Davis in Davis v. North Carolina, 384 U.S. 737 (1966), "an impoverished negro with a third or fourth grade education" whose low level of intelligence was specifically noted and commented upon even by the state trial court (id at 742), the instant petitioner, at the time of his confession was, according to contemporaneous psychiatric report, of average intelligency (Resp. Exhibit "A").* Moreover, and of quite critical significance in this connection, is the fact that petitioner had a serious prior experience with the police having been convicted of robbery in the second degree on January 7, 1953 -- only five years before the incident involved here. (Pet. Exhibit 1-I, Minutes of Nov. 13, 1958, pp. 2-4)* Contrast with Clewis v. Texas, 386 U.S. 707, 712 (1967).

As a result of that previous conviction, petitioner has served four years in state prison (Resp. Exhibit "A").

In no sense or stretch of the imagination can petitioner seriously seek to portray himself as a "child" or as overawed, overwhelmed and overborne by reason of immaturity.

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* Part of the original record on appeal.

(b) Circumstances of Petitioner's Arrest

Unlike Clewis v. Texas, 388 U.S. 707 (1967) where the first incriminating statement "was secured following an initial taking into custody which was concededly not supported by probable cause" (id at 711) the petitioner here was clearly arrested on a valid charge and not a pretense. Here the police went to the apartment of the complainant and were accompanying her out of the house when they came upon petitioner. The complainant pointed the petitioner out of the detective on the spot (H. 60-61). According to the arresting officer the first thing petitioner was questioned about at the stationhouse was the assault on the complainant (H 61); contrast with Clewis, supra at 711, n. 7.

The factor of an arrest on a pretense similarly can be eased from the "totality of circumstances" equation.

(c) All Night Questioning

Even by petitioner's admission at the mandated hearing he "wasn't questioned for a while, for a few hours." (H 21). To the extent that the interrogation was prolonged during the evening it was justified by reason of the fact

that late in the evening alert and quite laudatory police work indicated that petitioner was a possible suspect in a more serious crime than the assault in Manhattan, a Bronx bank robbery (H 64). Accordingly a line-up was quickly arranged before midnight (H 70) (H 84) in order that some witnesses to the bank robbery would be given the opportunity to identify petitioner.

The next morning petitioner was transferred to the Bronx police precinct in charge of the robbery investigation (Hn 66) and the questioning centered around the location of the robbery proceeds. Later in the afternoon petitioner agreed to take the Bronx police to a location in Manhattan where he would get the money (H 85-86). Indeed petitioner was permitted to have his friend join in the trip to recover the money (H 65). Since petitioner did not return to the precinct until late afternoon he was not arraigned until the following day.

Unlike Clewis v. Texas, supra there was nothing like the prolonged "stream of events" (id at 710) of some nine days indicating as the Court observed there that the interrogations (unlike the instant one) "was not intended merely to secure information, but was specifically designed to elicit a signed statement of 'the truth'" i.e., "the police view of the truth.'" id at 711-712. (emphasis supplied).

The record substantiates the fact that there was no continuous questioning and that the questioning here was in no manner designed to pressure petitioner into saying what the police wanted in order to stop the interrogation.

(d) Denial of Sleep and Food

The petitioner as just noted (1c], supra) admitted that he was not questioned for several hours (H 21). Indeed, the testimony indicates that he was free to sleep if he desired (H 64).

Petitioner admitted at the hearing before this Court that he made no request for food (H 40-41) and the additional testimony shows he was offered food but refused it (H 63).

The Court of Appeals in United States ex rel. Standbridge v. Zelker, 514 F. 2d 45, 47 (2d Cir. 1975) significantly indicated that a detainee must request time to sleep and food to eat.*

Petitioner's contentions, seeking to encompass the lack of food or sleep farction in the "totality" integer similarly must perforce food.

* Petitioner at the hearing testified in substance that he voluntarily had not eaten since breakfast of the day of his arrest (H 40). He was arrested at 8:30 p.m.

(e) Deception by False Promises of Help

The evidence at the hearing adduced from petitioner is indeed equivocal with respect to deception by alleged false promises of help. Clearly the evidence is hardly of the quality which would preponderate in favor of such allegations:

First, petitioner alleged a promise by the police that they would drop the assault charges in Manhattan in return for the proceeds of the Bronx bank robbery (H 32). Minutes later at the hearing, petitioner testified that he "...might not necessarily recall a promise made which contributed to the weakening or breaking of my resolve to resist the physical coercion."* (H 44). Then, in less exalted terms petitioner testified that he "...ain't got no recollection of [detective] Corbett ever promising me any such help." (H 44).

Detective Beckles affirmatively testified that he did not promise petitioner that his claim to the money would not be contested under any circumstances but that if in fact the money were gambling winnings petitioner's claim of ownership would not be contested (H 67-68).

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* As we will discuss infra, the issue of physical coercion has been exercised from this case by the very decision which mandated the District Court hearing.

The facts in the instant case pale in comparison with those in Lynum v. Illinois, 372 U.S. 528, 521-535 (1963) where the petitioner testified that the police threatened that her children would be taken from her if she would not cooperate. The gruesome and macabre deception in United States ex rel. Everett v. Murphy, 329 F. 2d 68 (2d Cir. 1964) dramatizes the flimsiness of petitioner's alleged claim of deception here.

Petitioner again failed here to sustain this factor in the equation.

(f) Deprivation of Support of Counsel or Friends Until Petitioner Confessed

The gravamen of this contention necessarily conjures up the picture of a suspect's helpless isolation from his friends, relatives and counsel while being surrounded by a friendless enemy camp. The classic cases illustrating such claim were cited by this Court in its remand order doubtless to have the District Court determine whether they match with the adduced facts here. They emphatically do not.

In Haynes v. Washington, 373 U.S. 503 (1963) the suspect several times asked the police to allow him to call an attorney and to call his wife. In fact, according to Haynes, he was "held incommunicado by the police until some five or seven days after his arrest." id at 504.

In Haley v. Ohio, 332 U.S. 596 (1948), referred to earlier in this memorandum, a fifteen year old boy was held incommunicado from 6:30 a.m. on Saturday through Tuesday.

Here petitioner testified (obviously as an afterthought) that one of the detectives (deceased at the time of the hearing) "asked me if I wanted to call somebody, wanted to make a telephone call, and I didn't have this in mind, although when he said it I immediately thought of calling my family and I said yes." (H 22) (emphasis supplied). Petitioner admitted, by the way, that he "did not testify to this at the original trial..." (H 23). It is clear that this previously convicted felon, who had served time in a state prison, was not the type who felt isolated in the presence of police officers and it is therefore unastounding that he "didn't have [it] ... in mind" to telephone or request anyone. It is noteworthy, as well, that petitioner's friend was, as noted earlier, permitted to accompany him in the presence of the police to retrieve the proceeds of the robbery (H 65).

Petitioner never had "in mind" to call his family and his claim of isolation, in view of the particular petitioner's previous felony conviction and sentence is highly suspect.*

Finally, despite petitioner's vivid memory of past events, he candidly could not recall that a promise to help him in court had been made.

Perhaps the true answer behind the allegations here, including his by now stale claim of physical coercion is found in petitioner's stream of consciousness answer at the hearing (H 23-24); petitioner's "legal studies" in prison conjured up in him the creative talent to match the Court's confession cases with his own. Even if it is meant constructing a case to fit the pegs.

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* Although we are cautioned that one's prior incarceration does not "alleviate" the possible effect of an extended detention or interrogation, Davis v. North Carolina, supra at 752, the Court has noted as a significant factor in cases involving claims of incommunicado, one's previous experience with the criminal law. Lynum v. Illinois, supra at 534.

In any event, it is clear that the District Court misinterpreted this Court's prior mandate and erroneously found that petitioner has sustained the burden required by this Court to demonstrate that his confession was mentally coerced. His will was not, in any manner, overborne at the time he confessed. Lynum v. Illinois, supra at 534.*

POINT II

PETITIONER'S CONFESSION WAS NOT THE RESULT OF MENTAL COERCION.

At the hearing held before the District Court, the petitioner testified that he was constantly asked where the money was and that he was beaten by Detective Corbett and others when he refused to tell (H 19) and that he was beaten throughout that night (H 25, 32).

He stated that he could not take the beatings so led the detectives to the money (H 33) and that to avoid further beatings he led the detectives to the money (H 36).

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* Dr. Lichenstein's testimony with respect to a hypothetical psychotic episode that petitioner may have sustained at the time of his interrogation (H 55) not only is wholly speculative but was clearly incredible in light of the Doctor's own claim that the only way to tell of such episode would be by petitioner's description of the episode and by the contemporaneous psychiatric reports, both of which are silent on this subject.

Petitioner clearly testified that he confessed because of the alleged beatings. He stated:

> "So in any event, Beckles takes me out of the pen - they put me in the detention pen - and takes me into another room where I confessed to the crime, but this was after the beatings - being beaten by Detective Beckles or another fellow, another detective."
>
> "Q. Detective Beckles?
>
> A. No, being beaten by Detective Corbett; did I say Beckles?
>
> Q. Yes.
>
> A. Well, it was Detective Corbett while another fellow was holding me.
>
> Q. Was Detective Beckles there?
>
> A. No.
>
> Q. And in the process of that latter beating was anything said to you?
>
> A. Well, as I recall it, the only thing that was said that I recall was, 'you robbed that bank, didn't you?' And when I said no, he - I was hit, punched several times by Corbett and finally I said, 'Yes.' And then he asked me several other questions about a stolen car. I was, you know - I said yes, after he punched me a few more times, you know the effect, you know, from the time I was arrested, you know, no food and no sleep and -" (H 39-40).

Later, petitioner testified:

> "And I might have been then and there ready to grab any excuse to bring this beating to a stop..." (H 44)
>
> * * *
>
> "Q. At the time that you told them, led them to the money, did you believe at the time that you could continue to refuse to lead them to the money and escape further questioning?
>
> A. I knew if I didn't, you know, I was going to be beaten again, you know..." (H 45).

The substance of petitioner's testimony was that he confessed because he was continuously beaten and he wanted to avoid further beatings.

In United States ex rel. Stanbridge v. Zelker, 514 F. 2d at 51, n. 23, supra, the Court of Appeals stated that "'[A]rguments...which are premised on 'facts' found at the Huntley to be untrue, need not concern us.'" Citing as authority, United States ex rel. Latham v. Deegan, 450 F. 2d 181 (2d Cir. 1971).

Petitioner's testimony that he was beaten, therefore, could not be used to prove his argument that his confession resulted from physical coercion. This Court explicitly

found that the Huntley Court finding that there was no physical coercion was fairly supported by the record.* The District Court "assumed that petitioner was not beaten and his confession was not physically coerced." Opinion, Appendix p. 32 , n. 3.

Petitioner's testimony does go the issue of his credibility and must be considered along with the totality of the circumstances surrounding his confession. Petitioner argued to this Court that his confession was the product of mental and physical coercion. This Court found that the State Court finding that it was not the product of physical coercion was fairly supported by the record. Petitioner then testified in the District Court that he confessed to avoid further beatings. Thus the factors that allegedly resulted in mental coercion, were insignificant factors in the resultant confession. Not only did petitioner not prove all of the factors outlined by this Court in its "calculus" of mental coercion, but essentially, he testified that he did not really confess because of those alleged factors. Petitioner in no way proved that his confession was the product of mental coercion.

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* Detective Corbett, allegedly the major perpetrator of these beatings, testified that he did not beat petitioner (H 86).

Finally, and of critical significance is the point that if indeed, as we maintain the record demonstrates, all claims of "mental" coercion are referable to alleged "physical" coercion, the respondent, not petitioner, is coming "very close to arguing this is a case for summary judgment" (H 103-104). Since the State Huntley Judge found no physical coercion and this finding has been presumed by this Court to be correct (520 F. 2d 902-904), and all claims here are based in the final analysis upon that physical coercion, the doctrine of LaVallee v. Delle Rose, 410 U.S. 690 (1973) applies and the petitioner must fail.

POINT III

EVEN IF PETITIONER'S CONFESSION WERE THE PRODUCT OF MENTAL COERCION ITS INTRODUCTION AT TRIAL WAS HARMLESS ERROR.*

* This Court's statement in its prior opinion that a conviction tainted by an involuntary confession cannot stand does not prevent reconsideration of that issue, since that was merely a conclusiory statement not briefed by the parties. The docket entries of the Northern District in the lower court proceeding that resulted in that appeal indicate that the writ was dismissed below by Judge Port sua sponte without response from the Attorney General. Thus, the proceeding before Judge Frankel was the first District Court proceeding in which respondent had an opportunity to present this argument.

Notwithstanding prior holdings of the Supreme Court that where a coerced confession was introduced at trial, the error could not be harmless, Rogers v. Richmond, supra; Payne v. Arkansas, 356 U.S. 560 (1959); See, Chapman v. California, 386 U.S. 18 (1967), the Court itself retreated from that absolute position in Milton v. Wainwright, 407 U.S. 371 (1972). Indeed, the District Court did not doubt that the introduction of a coerced confession could be harmless error.

In Milton, supra, the State introduced a confession obtained by a police officer who posed as a fellow prisoner and was confined in the cell with the defendant. According to the dissent, it took thirty-six hours of prodding to induce the defendant to talk. The defendant had already been indicted and was represented by counsel. The Court found that the introduction of the confession was harmless beyond a reasonable doubt citing Chapman, supra and Harrington v. California, 395 U.S. 250 (1969). It stated at 407 U.S. 377-78:

> "[W]e do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the State Court fourteen years ago by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and adequately upen to chalienge was, beyond reasonable doubt, harmless."

Milton, supra, is significant because it moves away from holdings of Chapman, supra, and Harrington, supra, that some constitutional errors are so egregious as to warrant automatic reversal no matter what the weight of other evidence. Chapman, supra entailed a two part test: First, the Court looked to the nature of the constitutional error. Only if it were not of a particular class, e.g., a coerced confession, would it continue to the second stage where the Court weigned the other evidence aganst the accused.

Milton, supra must be seen as an abandonment of that two-part test in favor of a single test. Under Milton, supra, even where the alleged error is a coerced confession, the Court should apply only the second part of the Chapman test: The measuring of the weight of the other evidence.

In United States ex rel. Moore v. Follette, 425 F. 2d 925 (2d Cir.) cert. den. 90 S. Ct. 2189 (1970), the Court found that the introduction of an allegedly improper confession was harmless error where there was other overwhelming evidence of

guilt, including another confession, the testimony of a co-defendant, and no serious defense. The Court stated, 425 F. 2d at 928:

> "While the case where admission of an improperly obtained confession can be considered harmless error is exceedingly rare, this is one."

This Court has found that a statement arguably elicited in violation of Miranda and introduced at trial was harmless error where there was other overwhelming evidence of guilt. United States ex rel. Hines v. LaVallee, 521 F. 2d 1109 (2d Cir. 1975) cert. den. 96 S.Ct. 884. In United States v. Williams, 524 F. 2d 407 (2d Cir. 1975), the court found it harmless error where an FBI agent testified that the defendant declined to make a statement after receiving his Miranda warning even though the testimony could have violated the defendant's Fifth Amendment right to be free from compulsory self-incrimination.

In United States v. Duvall, 537 F. 2d 15 (2d Cir., 1976), this Court found that the introduction of the defendant's Statement to an Assistant United States Attorney was harmless error, although it should have been suppressed. The defendant made the statements to the Assistant when he was brought to the Assistant so the Assistant could "get information" from him

instead of being brought before a Magistrate. The Assistant exaggerated the possible sentence to 100 years and told the defendant he could leave if he answered his question. The defendant was then arraigned, more than twenty-one hours after arrest. Again, although the Court of Appeals agreed that the statements should have been suppressed, the egregious nature of the assistant's conduct was insufficient for a reversal since there was other overwhelming evidence of guilt. A similar analysis was made in Smith v. Estelle, 519 F. 2d 1267 (5th Cir. 1975); See, United States v. Sigal, 500 F. 2d 1118 (10th Cir.) cert. den. 419 U.S. 954 (1974); Phillips v. Neil, 452 F. 2d 337 (6th Cir. 1971); Bledsoe v. Nelson, 432 F. 2d 923 (9th Cir. 1970); United States ex rel. Galloway v. Fogg. 403 F. Supp. 248 (SDNY 1975).

Here, seven eye-witnesses to the robbery and assault positively identified petitioner. The District Court found that "the in-court identifications did not violate due process and taint petitioner's conviction." Opinion appellant's Appendix, p. 36 , n. 19

The first witness, Harry Viseltear, Branch Manager of the bank, and thus a victim, identified the defendant at

trial (T. 15) * and testified that the robbery took four or five minutes (T. 32).

On an extensive cross-examination that largely concerned his identifying petitioner, Mr. Viseltear testified that the bank was satisfactorily lighted with neon-tube lighting (T. 34), that the robber was close to where he was sitting and was wearing a dark hat not pulled low over the forehead and overcoat, glasses and had an uncovered face (T. 35). The witness saw the defendant at the stationhouse about 3 or 4 weeks after the robbery and picked the defendant out immediately (T. 38). He was absolutely sure that the man he identified in the courtroom as the defendant was not the man sitting next to the defendant** (T. 39). Mr. Viseltear looked at the robber for about a minute while he walked towards the robber from his desk (T. 45). He later looked at him again for some seconds (T. 45). The witness was cross-examined about his eyesight (T. 41-42). He looked at the defendant's face and not his clothes at the stationhouse (T. 51) and recognized him instantaneiously (T. 52). He described the robber's face without looking him and recognized him in the courtroom instantaneously (T. 53).

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* Page references preceded by T refer to the trial transcript Exhibit 2 at the evidentiary hearing below. It is part of of the Record before this Court.

** Another black man with the same general description sat next to the defendant in the courtroom (T. 53,66, 106-107).

Frances Kleber, the 13 year old who the defendant grabbed around the neck and against whose head the defendant put a gun (T 108-09) testified that the robber had a triangle shaped space between his two front teeth (T. 102) described his weight, coloring and type of glasses he wore (T. 103) and what he was wearing (T. 104). She clearly identified the defendant and excluded the man sitting next to him (T. 105-06).

She was cross-examined about her identification (T. 115-125). The witness testified that the holdup took about five minutes (T. 116), that she saw the defendant through a peephole (T. 118) and identified him by the space between his teeth (T. 121) two weeks after the robbery (T. 125).

Alice Kleeber identified the defendant (T. 142), testified that the robbery took 5-7 minutes (T. 143), and was sure that the man sitting next to the defendant at trial was not the robber (T. 143).

She was extensively cross-examined about her identification (T. 146-63). She stated that she had been asked to identify several people in connection with the robbery before identifying the defendant but had declined to do so (T. 155). When she identified the defendant at the stationhouse, she was

certain he was the robber (T. 156, 159) and looked at his two times (T. 157). She was cross-examined with respect to her eyesight (T. 162).

On redirect, the witness testified that she looked at the robber 7 or 8 times during the holdup (T. 164, 166).

The next witness, Fannie Backenheimer, a bookkeeper for a depositor, identified the defendant (T. 168) and was extensively cross-examined about her identification (T. 170-81). She testified that looked at him for 10 seconds and described the robber (T. 172). She looked at him three times during the robbery (T. 173) and when she saw him at the stationhouse identified him immediately (T. 177).

Arthur Grottner, a deliveryman*, who was in the bank, testified that he sat down as told during the holdup and observed everything (T. 183). He, too, identified the defendant (T. 185).

On extensive cross-examination about his identification (T. 189-202), he testified that he sat in a chair 5 or 6 feet from the robber (T. 189), and saw him front face and profile for a period of 3-3 1/2 minutes (T. 190). He looked

* The defendant at first thought he was a guard and pointed a gun at him (T. 183).

at the robber 4 or 5 times and saw him full face (T. 191). He clearly remembered what the robber was wearing at the bank (T. 196) and testified that the robber had a face he would never forget (T. 198). He described the face of the robber (T. 199) and testified that the robber looked at him 4 or 5 times (T. 202).

Charles Calabrese, a teller, testified that the robber came to his cage (T. 205) and identified the defendant (T. 206). He was extensively cross-examined about his identification (T. 210-18) and testified that he saw the robber at 17 feet (T. 211), watched him for 2 minutes (T. 213) and described his clothes and moustache (T. 214).

He further testified that he picked the defendant out of a lineup with 3 other Negroes (T. 215, 216, 219), none of whom were in uniform (T. 216). Three wore overcoats, one with a gray hat and one wore a suit (T. 216). The defendant wore a dark blue overcoat and another man in the lineup wore a black one (T. 217). On redirect, he testified that he never saw the defendant through a peephole (T. 219).

Robert Schneider, a note teller, identified the defendant (T. 246). He was extensively cross-examined in his identification (T. 246-53, 262-65). He described his clothes, and moustache and glasses (T. 247) and stated he was 8 feet from the robber.

He picked him out of a lineup with four Negroes, three of whom wore overcoats and one of whom wore a suit (T. 248, 249). All were light skinned, although maybe one man was a little darker (T. 250) and three wore dark rimmed glasses (T. 250). He observed the robber from the time he said it was a holdup til he left the bank (T. 256).

Each witness was able to view petitioner's unmasked face, in daylight, at very close range, and for a considerable length of time. They had more than sufficient opportunity to see and remember his face. The prior descriptions of petitioner by the witnesses were sufficiently specific and with almost no variation. Considering that petitioner offered absolutely no defense at trial, it can be concluded without doubt, that the testimony of those seven eye witnesses alone would have resulted in petitioner's conviction. Thus, the introduction of his confession, even if this Court concludes it was the product of mental coercion, was, beyond a reasonable doubt, harmless error.

CONCLUSION

THE ORDER OF THE DISTRICT COURT SHOULD BE REVERSED AND THE PETITION DENIED IN ALL RESPECTS.

Dated: New York, New York
September 21, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

David L Bird, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for appellant herein. On the 21ST day of September, 1976, he served the annexed upon the following named person :

Lawrence Stern, Esq
11 Monroe Pl.
Brooklyn, NY 11201

Attorney in the within entitled appeal by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

David L. Bird

Sworn to before me this
21ST day of September, 1976

Myra Ambrant Bayer
Assistant Attorney General
of the State of New York